Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1997

PATRICIA KOCH, JOHN S. LUPI, TERRY L. ADAMS, BARBARA KERTIS, MARY E. MAGAW, HAROLD ETSELL, JR., BERNARD DEVLIN, DAVID LEE, SALVATORE J. ILLUZZI,

*Petitioners,*

*vs.*

GEORGE W. JAMES, WILLIAM BLANCHE, WILLIAM C. DUNKIN, DAVID G. SINGLES, MARK S. BETTNER, CHARLES KELLY, JR., KEVIN J. KELLY, HENRY BUCHHOLZ and JESSE CARTER,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the lower courts err by departing from holdings of Your Honorable Court and other circuit courts that voter reapportionment plans must be based upon census figures unless clear, convincing, and cogent evidence is presented documenting the validity of updated population figures?

2. Did the lower courts err by rejecting the School Board's res judicata/collateral estoppel, abstention, and Rooker-Feldman defenses on the basis that there was no privity between the plaintiffs in the prior state court action and the instant federal action?

3. Did the District Court commit procedural errors by failing to take evidence on the critical privity issue and granting the Taxpayers an injunction with virtually no discussion on the critical elements which the Taxpayers were required to establish in order to be granted injunctive relief?

## LIST OF PARTIES

The names of all parties to the proceeding in the court where judgment is sought to be reviewed here appear in the caption of the case, except Chichester School Board. The undersigned represented the Chichester School Board and the nine individual defendants at the District Court and Court of Appeals levels. The Chichester School Board has not authorized the filing of the instant Petition for Writ of Certiorari and accordingly it is filed only on behalf of the nine individual defendants, which is reflected by the caption on the cover.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is not reported. The Memorandums and Orders of the United States District Court for the Eastern District dated September 10, 1997 (App. C., 45a-50a ) and January 30, 1998 (App. B., A.26a-44a ) are not reported.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit issued its decision and entered judgment on April 27, 1998. (App. A., 1a-25a) Your Honorable Court's jurisdiction arises under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action was brought under several constitutional and statutory provisions. The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, Section 1 of the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . Causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding, for redress . . .

42 U.S.C. § 1988 provides as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce the provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

## STATEMENT OF THE FACTS AND THE CASE

### A. Procedural History

This action was initiated in the United States District Court for the Eastern District (hereinafter "the Eastern District") November, 1996, by the Respondents, a group of taxpayers residing in Upper Chichester Township, Pennsylvania, (hereinafter the "Taxpayers"), against the Chichester School Board and the Petitioners, eight current and former school board directors and Superintendent Dr. Salvatore Illuzzi (hereinafter collectively referred to as the "School Directors"). The Taxpayers contended, *inter alia*, that the voting regions of the Chichester School District (hereinafter the "School District") in place at that time violated "one man, one vote" principles in contravention of the Equal Protection clause. At the time that the Respondents filed this action, proceedings were pending in the Delaware County Court of Common Pleas (hereinafter the "State Court") to reapportion the School District, which resulted in an Order concluding the State Court proceedings on February 26, 1997. The State Court action was filed by individuals whom the School Directors submit were in privity with the Taxpayers in the instant action. As a result of the State Court Order on February 26, 1997, the School Directors raised issues of res judicata/collateral estoppel, abstention and mootness as well as the "Rooker Feldman" doctrine.

On July 30, 1997, the Taxpayers filed a Motion for Injunctive Relief and Summary Judgment seeking, *inter alia*, that all nine School Board directors resign immediately and that the School Board be realigned from its nine (9) region configuration to an "at-large" configuration. On August 15, 1997, the School Directors responded to the Taxpayers' Motion and filed a Motion for Summary Judgment of their own, alleging that they are entitled to judgment as a matter of law based on several legal doctrines including abstention and res judicata/collateral estoppel. The District Court never expressly ruled upon either Motion for Summary Judgment.

Following a Hearing on September 4, 1997, at which no evidence was presented, the District Court entered an Order on

September 10, 1997 instructing the parties to confer with each other and State Court officials as they deem appropriate and achieve a plan in which all nine members of the School Board would be elected pursuant to a tri-regional plan at the primary election or a special election to be held in early 1998. (App. C., 49a-50a)[1] The District Court further stated that if the parties are unable to agree upon a tri-regional plan, they should each submit proposed plans by December 1, 1997. The parties were unable to agree upon a tri-regional plan, and on December 1, 1997, in accordance with the District Court's September 10, 1997 Order, the parties submitted proposed plans. After being apprised of additional pertinent information pertaining to population, on December 19, 1997, the School Directors filed two alternate plans with the District Court.

On January 8, 1998, a Hearing limited to the issue of population and the voting regions was held before the District Court on the proposed plans. The School Board presented Affidavits from officials of the various municipalities in the School District setting forth information on building permits and demolition permits since the 1990 census. Dr. Illuzzi testified in support of the School Directors' primary plan in which he used the 1990 census figures as a base and updated the figures utilizing the permit information, information on 1993 ward boundary changes and 1994 voter registration, as well as information on population growth in Upper Chichester Township. Ronald Uroda, Demographic Services Coordinator for the Pennsylvania State Data Center, validated the methodology used by Dr. Illiuzzi and indicated that the population figures which he arrived at were reasonably accurate. The School Directors also presented a plan based solely upon 1990 census figures with adjustments for 1993 ward boundary changes.

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1. The School Directors interpreted the District Court's September 10, 1997 Order as authorizing the filing of a petition with the State Court, which the School Board did on November 19, 1997. The Taxpayers filed a Notice of Removal to District Court, and the School Board filed a Motion to Remand. Although the District Court acknowledged at a December 4, 1997 hearing that the matter is not removable, the District Court did not enter an Order on the removal issue.

The Taxpayers submitted plans which used 1996 census estimates as a base and which, as will be discussed in more detail herein, were rife with inconsistencies and inaccuracies.

By Memorandum and Order dated January 30, 1998, the District Court ordered that the offices of all nine school board directors be terminated on June 30, 1998 with the vacancies filled at a special election to be held in conjunction with the May 19, 1998 primary election, with those elected taking office on July 1, 1998. The District Court held that at the special election, the new School Board would be elected on the basis of the primary plan submitted by the Taxpayers unless the State Court approves another plan submitted by the School Board which complies with statutory and constitutional requirements. (App. B., 41a-44a). The District Court granted the School Directors ten days to file a Petition in State Court.[2] On February 11, 1998, the School Directors filed a Notice of Appeal with the United States Court of Appeals for the Third Circuit in which it appealed the portion of the District Court's September 10, 1997 Order in which it held that all nine School Board members would run at a primary election or special election in early 1998, and the January 30, 1998 Order in its entirety. On April 27, 1998, the United States Court of Appeals for the Third Circuit affirmed the District Court's decisions. (App. A., 2a).

**B. Chronology**

The Chichester School District is a small school district in southeastern Pennsylvania, bordering on Delaware, and encompassing Upper Chichester Township, Lower Chichester

2. The School Directors filed a Petition in State Court on February 9, 1998 in which they proposed three plans. The Taxpayers entered their appearance in that case and presented for the State Court's consideration the same two plans which they had submitted to the District Court as well as a modified version of the School Board's proposed plan number 3. Hearings were held before State Court Judge Joseph Battle on February 20, 1998, February 26, 1998, and March 4, 1998. On March 13, 1998, Judge Battle entered an Order approving the Taxpayers' modified version of the School Board's proposed plan 3. The plan approved by the State Court was based upon 1996 estimates.

Township, the boroughs of Marcus Hook and Trainer. The School District was divided into nine (9) voting regions more than thirty years ago. *See In Re: Chichester School District,* 210 Pa. Super. 426, 234 A.2d 187 (1967). Since then, the growth in population among the nine regions has been unequal, with the greatest population growth occurring in Upper Chichester Township. By the time of the 1990 decennial census, it was clear that the regions were unequal under one-man, one-vote principles. However, no one took curative action and, under Pennsylvania law, there is no legal requirement that anyone take action to cure the unequal representation, although the law does authorize both taxpayers and the school district to take curative action if they desire. *See* 24 P.S. § 3-303.

After 1990, population growth continued in the school district, occurring primarily in Upper Chichester Township. Estimates issued by the Census Bureau for 1994 confirmed that the voting regions were becoming even more unequal. At about that time, a school board director, Mr. Buchholz, formed an organization called "QUEST", which is an acronym standing for "quality education with sensible taxation." Since then, he has been President of QUEST. Mr. Buchholz and QUEST have been active since that time holding meetings, compiling mailing lists, raising funds, and publishing newsletters. The Taxpayers in this action have attended QUEST meetings and made financial contributions to QUEST.

Mr. Buchholz, in the finest tradition of free speech and political campaigning, produced and distributed newsletters under the QUEST banner to people in the community in which he emphasized his desire to have the School Board realigned in such a way that Upper Chichester would be given greater representation on the School Board. For example, in a May, 1995 QUEST newsletter, Mr. Buchholz stated, "QUEST is about to launch its boldest adventure yet. We are going to petition the courts to realign the School Board." Determined to have the School Board realigned in such a way that Upper Chichester be given more representation, Mr. Buchholz, in late 1995 or early 1996, met with lawyer Peter

Rohana and discussed the issue of having the School Board realigned. Upon Mr. Rohana's advice, at the School Board meeting on March 5, 1996, Mr. Buchholz made a motion to have the School Board realigned. Because Mr. Buchholz did not follow Board policy in making this motion, the vote was delayed. Mr. Buchholz made a similar motion at the School Board meeting on April 24, 1996. This motion was not approved.

Mr. Buchholz then decided to take legal action by filing a petition in State Court to force a realignment. As he is a member of the School Board, he chose not to be the lead Plaintiff in this action, but he told a man he knew named Joseph DiMarco, that "If this litigation is to go forward, somebody has got to take it and it can't be me. Mr. DiMarco said that he was willing to go forward with the action." Mr. Buchholz took Mr. DiMarco to Attorney Rohana's office to discuss the filing of the suit. At this meeting it was agreed that QUEST would pay for the State Court action, and Mr. Rohana sent his bills to QUEST. Actually, Mr. Buchholz had agreed to fund the suit prior to Mr. DiMarco meeting with Mr. Rohana, QUEST funded virtually the entire State Court suit by paying $7,500 of Mr. Rohana's bills. At a QUEST meeting during this time, Mr. Buchholz solicited contributions from people who attended the meeting to pay for anticipated costs of the pending State Court action.

Pursuant to this plan that was conceived, funded and hatched by Mr. Buchholz, on April 30, 1996, Mr. DiMarco, on his own behalf and on behalf of 282 qualified electors of the School District, including several of the Taxpayers, who signed a petition evincing their support, filed suit in State Court pursuant to the Pennsylvania School Code, 24 P.S. § 303(b)(2) seeking reapportionment of the School Board. At the June 1996 School Board meeting, the School Board approved a resolution for realigning the Board whereby Upper Chichester would gain a seat on the School Board, giving it five, and the other three municipalities would lose a seat, giving them four. The Board then filed a cross-petition with the State Court asking the Court to approve the five/four plan (five School Board directors in Upper Chichester Township, four in the

remaining municipalities). A hearing was held before Judge Battle in State Court on August 6, 1996, at which Mr. Buchholz testified, and by Order dated August 16, 1996, Judge Battle denied the Petitioners' request to have the School Board aligned at-large and granted the School Board's petition to maintain the nine-region plan with one seat being moved from Marcus Hook to Upper Chichester.

In his September 1996 QUEST newsletter, Mr. Buchholz stated, "*We* must appeal Judge Battle's decision." (Emphasis added). Furthermore, in that newsletter, Mr. Buchholz requested that each property owner contribute $25 to help defray the legal fees of the state suit. He urged people to distribute his newsletters and furnished his phone number to anybody who could help in the delivery process. Subsequently, Judge Battle's decision was appealed to the Commonwealth Court of Pennsylvania, at which time Attorney Peter Frattarelli (husband of Santa Frattarelli, originally one of the Plaintiffs in this action) replaced Mr. Rohana and assumed the representation of Mr. DiMarco. Mr. Frattarelli sent bills to Mr. Buchholz for work he did on the appeal. During the pendency of that appeal, the Taxpayers' counsel Terry Silva, filed an amicus curiae brief in support of Mr. DiMarco.

While the State Court proceedings were pending in the Commonwealth Court, the Taxpayers in this action filed their Complaint in the District Court in November, 1996. In addition to seeking to have the federal court realign the School District, the Taxpayers' sought declarations that various contracts be declared invalid. Among the contracts attacked by the Taxpayers are the collective bargaining agreement with the teachers' union and the administrative compensation plan with the School District's administrators.

On February 13, 1997, the Commonwealth Court vacated Judge Battle's August 16, 1996 decision on the basis that he did not specify whether the regions of the nine-region plan which he approved were established in such a way that the population of

each was as nearly equal as possible as required by the Pennsylvania School Code.

On remand, Mr. Frattarelli and School District Solicitor Mr. Levy agreed that it was in the best interest of both parties to develop a realignment plan acceptable to the parties and the court. Thus, a tri-regional plan was developed, presented and approved.

Prior to accepting the tri-regional plan formally, Mr. Frattarelli told Mr. Levy that he would have to check with some people, one of whom was Mr. Buchholz. He also spoke to Ms. Silva. It was only after speaking to these people that Mr. Frattarelli got back to Mr. Levy and said that the tri-regional plan proposed by Mr. Levy was acceptable. Mr. Frattarelli acknowledged that to some extent he considered Mr. Buchholz's input important in evaluating whether to accept the proposal. The School Board then approved the tri-regional plan at a special meeting on February 25, 1997. However, the parties disagreed as to the timing for implementation of the plan and that disagreement was resolved through a hearing before State Court Judge Battle on February 26, 1997.

Mr. Buchholz testified at that hearing, and did not object to the tri-regional plan agreed to, but did object to the implementation schedule. Mr. Buchholz also stated at a Republican Party meeting that the tri-regional plan was acceptable. Ms. Silva attended the hearing before Judge Battle and did not express opposition to the tri-regional plan. William Dunkin, another one of the Taxpayers, publicly expressed agreement with the tri-regional plan.

On February 26, 1997, Judge Battle entered an Order approving the tri-regional plan and ordered that the change be implemented in time for the 1999 elections. Judge Battle's Order was not appealed and it is final.

Mr. Buchholz's integral role in attempting to have the School Board realigned continued as he placed an advertisement in a local newspaper, soliciting contributions for QUEST to assist in the funding of the federal action. In the advertisement, Mr. Buchholz implored taxpayers to contribute $25 to QUEST if they are "tired

of the taxes in the Chichester School District and want to help to do something about it." Approximately 50 people made contributions.

Notwithstanding the State Court's resolution of the reapportionment dispute, and despite the involvement of Mr. Buchholz and Ms. Silva in the resolution of that dispute, the Taxpayers continued on with this litigation, filing a variety of motions and seeking a number of remedies over the succeeding months of 1997. Virtually every motion filed by the Taxpayers was denied, except for the motion leading to the Orders subject to this Petition.

In accordance with the District Court's Order, the election proceeded on May 19, 1998, and Mr. Buchholz, Mr. Dunkin, Mr. Singles, Mr. Squadrito and three other individuals whom the School Board submits were in privity with the Taxpayers, were elected to seats. Mrs. Koch and Mrs. Magaw were the only Petitioners who were reelected to terms. Consequently, the terms of Mr. Etsell, Mr. Lupi, Mrs. Adams, and Mrs. Kertis were cut short and they left office effective July 1, 1998.

## REASONS FOR GRANTING THE WRIT

The three issues presented for appeal to Your Honorable Court each implicate the most fundamental principles associated with democracy and federalism. For example, the principle of one-man, one-vote is the bedrock of a democratic government. But is that bedrock eroded when voting districts are based, not upon decennial census figures, but upon pure estimates and extrapolations and upon inconsistently applied mathematics? Similarly, proper deference for State Court actions must be adhered to if federalism is to be maintained. But is that deference properly maintained when a District Court essentially reverses the actions of a State Court that are undertaken pursuant to the dictates of state law and in accordance with federal constitutional standards? Likewise, the cause of justice is furthered when the well entrenched procedures and processes are followed by the courts. But what lessons of

justice are taught to a community whose school district is torn apart in litigation that failed to follow the rules in many instances?

Although the issues in this case implicate lofty principles that are so fundamental to our system of government, such circumstances in and of themselves do not necessarily warrant review by your Honorable Court. Perhaps more importantly, the decisions below depart from well established precedent, both substantive and procedural. The Third Circuit's decision is certainly in conflict with decisions of other Circuit Courts of Appeal. For example, no other Circuit Court has based a voter apportionment plan on unsubstantiated interim census estimates. The cases from both Your Honorable Court and from every other Circuit and District Court has required that voter apportionment cases be based upon the decennial census, unless there was "clear, convincing and cogent" evidence of what the actual population numbers are. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Dixon v. Hassler*, 412 F. Supp. 1036 (W.D. Tenn. 1976), *affirmed sub nom, Republican Party v. Dixon*, 429 U.S. 934 (1976); *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993); *McNeil v. Springfield Park School District*, 851 F.2d 937 (7th Cir. 1988); *Perez v. Pasadena Independent School District*, 958 F. Supp. 1196 (S.D. Tex. 1997); *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990). No court has held that interim estimates constitute "clear, convincing and cogent" evidence of population. If interim estimates are sufficient, political havoc will result across the country in local and state politics as changes in their census estimates would support a redrawing of election districts. Furthermore, with respect to the issues growing out of the fact that the state court ruled on the apportionment issue on February 26, 1997, the lower courts did not properly apply the rules of privity. We are unaware of a single case other than this one where a state court realigned local voting districts, only to have the federal court essentially overrule the decision. If the decisions of the lower courts are allowed to stand, they provide a road map to litigants to avoid the preclusive effects of res judicata, collateral estoppel and Rooker Feldman. Any political group, as the taxpayers at bar, would simply

be able to assign different members of their group to different litigation. If these Taxpayers can get two bites at the apple and engage in litigation in both federal and state courts by naming different individuals to the separate cases, the judicial system will be overburdened and disputes will be allowed to thrive despite being adjudicated in an initial forum. If the federal judiciary can essentially ignore and overrule the decision of the state court, the ideals of federalism will certainly be weakened.

The School Directors submit that this is a critical matter affecting the entire school district community. It is vital that your Honorable Court resolve the conflicts between the Third Circuit and the other Circuit Courts whether interim census estimates may be used in voter apportionment cases. It is also important that your Honorable Court describe with clarity what constitutes privity in a voter reapportionment case. Finally, it is important that District Courts be required to act in accordance with well established procedure.

## ARGUMENT

### I. THE DECISIONS OF THE DISTRICT COURT AND THIRD CIRCUIT APPROVING THE TAXPAYERS' REAPPORTIONMENT PLAN BASED UPON PURE ESTIMATES VIOLATED THE WELL SETTLED PRINCIPLES ARTICULATED BY YOUR HONORABLE COURT AND SEVERAL CIRCUIT COURTS THAT DECENNIAL CENSUS FIGURES MUST BE USED AS A BASIS FOR A REAPPORTIONMENT PLAN UNLESS CLEAR, CONVINCING AND COGENT EVIDENCE IS PRESENTED DOCUMENTING THE VALIDITY OF UPDATED POPULATION FIGURES.

This is the first and only case we know of where voting regions were based upon pure census estimates and inconsistently applied extrapolations and not upon the decennial census or other "clear, cogent and convincing" evidence.

Perhaps the seminal case in this area of law is *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). In that case, Your Honorable Court made these key observations:

> Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. * * * Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of district toward the end of the decennial period and also to the development of resistence to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation.

377 U.S. at 583-584.

These principles were followed in subsequent cases. In *Karcher v. Daggett*, 462 U.S. 725 (1983), Your Honorable Court, citing *Kirkpatrick v. Pressler*, 394 U.S. 526 (1969), stated:

> [C]ensus data provides the only reliable — albeit less than perfect — indication of the district's "real"relative population levels * * *
>
> Because the census count represents the "best population data available" it is the only basis for good-faith attempts to achieve population equality.

103 S. Ct. at 2662.

In *Karcher* and *Kirkpatrick*, Your Honorable Court carved out a very narrow exception to the rule that census figures must be used. Your Honorable Court noted that if updated population

figures are used in place of census figures, the methodology may not be haphazard, inconsistent or conjectural. In the same vein, in order to base a reapportionment plan upon population shifts, those shifts must be predicted with a high degree of accuracy. In *Dixon v. Hassler,* 412 F. Supp. 1036 (W.D. Tenn. 1976), *affirmed sub nom., Republican Party v. Dixon*, 429 U.S. 934 (1976), it was emphasized that decennial census figures will be controlling unless there is "clear, cogent, and convincing" evidence that such figures are no longer valid.

The Circuit Courts have consistently reiterated these principles. In *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), the Sixth Circuit emphasized that more reliable, albeit outdated, decennial figures should be accepted over less reliable updated population figures. In *McNeil v. Springfield Park School District*, 851 F.2d 937, 946 (7th Cir. 1988), the Seventh Circuit emphasized that proof of a change in decennial census figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent, and convincing to override the presumed correctness of the prior decennial census.

The importance of these principles is well illustrated in *Political Action Conference of Illinois v. Daley*, 976 F.2d 335 (7th Cir. 1992), and *French v. Boner*, 963 F.2d 890 (6th Cir. 1992). In *Political Action Conference of Illinois*, class actions were brought challenging the aldermanic election/redistricting schedule for the city of Chicago. Under state law, aldermanic elections were held in February and April, 1991, based on ward boundaries established by the 1980 census, eleven years earlier. The 1990 decennial census figures were published on February 11, 1991, just 15 days before the February aldermanic election. The census figures showed that Hispanic population grew and that under new wards, Hispanics would be enabled to elect additional Hispanic aldermen. Holding that there was nothing wrong with basing the elections on 11 year old decennial census figures, the court said:

> As the district court observed, Illinois' statutory scheme results once every twenty

> years in the election of aldermen shortly before or immediately after the final census figures are released. * * * The scheme for decennial reapportionment necessarily will extend to the first general election pursuant to a new map. * * * Thus, data from every other census (i.e. the 1980 census and then the year 2000 census) may control aldermanic representation for fifteen years after the census is taken. The Plaintiffs' complaints question whether this statutory scheme violates the Voting Rights Act or constitutional norms.

The Seventh Circuit then quoted the language of *Reynolds* cited herein and emphasized that decennial reapportionment satisfies the Constitution, "even though undoubtedly there will be some imbalance in the population of each district toward the end of the decennial period." 976 F.2d at 339-340. By upholding decennial reapportionment even in the face of updated population figures, the court adhered to the rule that a decennial census controls, even where there is evidence that there has been change in population.

A similar issue was confronted by the court in *French*. The court ruled that elections based on districts developed with older census numbers did not run afoul of constitutional requirements. Rejecting the "common sense" approach that the wards and elections must be changed simply because of growth occurring after the decennial census upon which the wards were based, the court said:

> In any system of representative government, it is inevitable that some elections for four year or longer terms will occur on the cusp of the decennial census. The terms inevitably will last well into the next decade; and, depending on shifts in population in the preceding decade, the representation may be unequal in the sense that the districts no longer meet a one-person-one-vote

> test under the new census. * * * In order to maintain relative mathematical equality in a population constantly on the move, we would have to have short terms of office and annual census updates. Short terms would sacrifice the stability and experience in office that longer terms contribute. Refusal to honor the preference of state and local bodies for longer terms would increase the costs of elections for taxpayers and candidates and would make it more difficult for citizens of limited means to participate in local elective politics.

*Id.* at 891-892.

The import of the principles enounced in these cases cannot be overstated. It is inevitable that population shifts will occur between censuses, but because of the importance of stability in the offices of elected officials, census figures should be used as the basis for reapportionment plans. The only exception to the rule is if "clear, cogent, and convincing" evidence is accurately presented documenting, without speculation or conjecture, population shifts.[3] The District Court at bar agreed with the accuracy of census figures when it stated:

> Everyone agrees that the decennial census produces the most reliable population figures.

(App. B., 34a).

Ironically, the District Court then rejected the School Board's plan which was based upon census figures and accepted the Taxpayers' plan based upon the convoluted methodologies of their expert Leonard Cupingood. Without sufficiently explaining why,

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3. Similar principles have been stated by District Courts around the country as well as Pennsylvania State Courts. *See Perez v. Pasadena Independent School District*, 958 F. Supp. 1196 (S.D. Tex. 1997); *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990); *In re: Springford Area School District Division Case*, 210 Pa. Super. 338, 234 A.2d 184 (1967); and *In re: Petition of Central Bucks School District*, 23 D. & C. 4th 53 (1995).

the District Court rejected the School Board's plan based upon the census and stated as follows:

> I find that the report and testimony of [the Taxpayers'] expert Dr. Cupingood, is persuasive, and establishes that both of [the Taxpayers' plans] achieve constitutionally acceptable reapportionment.

(App. B., 37a).

In affirming, the Third Circuit made these comments:

> In this case, the population *estimates* of [the Taxpayers'] were objective, thoroughly documented,[4] and applied in a systemic manner,[5] [the Taxpayers'] expert submitted voluminous documentation of its methodology, and he described in great detail his reasons for taking his particular approach. * * * We hold that the District Court was entirely justified in relying upon [the Taxpayers'] expert's estimates rather than on obsolete data from the 1990 census.

(App. A., 22a) (emphasis added).

Conspicuously absent from the lower courts' decisions are any findings that the Taxpayers presented "clear, cogent and convincing evidence" of changes in population justifying departing from the 1990 census figures. Indeed, the record is overwhelmingly

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4. We have no understanding what thorough documentation the Third Circuit was referring. There was documentation of what census estimates were, but there was no documentation of any nature of their reliability. The underlying data supporting the estimates was not presented.

5. There were several examples that the extrapolations and mathematics were not consistently applied. For example, the Taxpayers' expert changed the population of Upper Chichester for the 1996-1997 time frame, but made no similar adjustment of the lower end (Lower Chichester, Marcus Hook, and Trainer).

clear that the methodologies utilized by Dr. Cupingood were rife with inconsistencies and fell considerably short of meeting the stringent "clear, cogent and convincing" standard.

The most glaring weakness in the methodology utilized by the Taxpayers' expert Dr. Cupingood is that he used pure estimates — indeed, he used estimates on top of estimates. In fact, the population figures arrived at by Dr. Cupingood represent a third level of estimates: They are estimates (i.e. county level population estimates based upon estimated births, deaths, and migration), upon estimates (i.e. township level population estimates based upon housing construction and demolition estimates), upon estimates (i.e. ward and precinct level estimates based upon housing permit information and taxable parcels). The School Directors submit that such concocted computations simply cannot be the basis for a valid reapportionment plan. At the January 8, 1998 hearing in District Court, Dr. Cupingood made numerous admissions which severely undermine the validity of his methodology and the accuracy of his estimates:

a. The interim Census Bureau estimates are based on statistical models rather than actual population counts. People frequently disagree as to the reasonableness of the particular models utilized by the Census Bureau. Dr. Cupingood has not done any studies to determine which statistical model is better. The Census Bureau has changed the statistical model a number of times and will change the statistical model in the future.

b. Any apportionment plan that is based on interim Census Bureau estimates necessitates multiple levels of estimates which underscores the unreliability of using estimates. First, the Census Bureau estimates the population of each county based upon information it receives on births, deaths and migration. Once the Census Bureau calculates an estimated population for the county, it then estimates the population of each municipality within the county. That estimate is determined by using permits. *No evidence was presented to validate the underlying data utilized by the Census Bureau to project its estimates.*

c. Unlike the decennial census figures, the census estimates published between decennial censuses do not make estimates for wards or precincts.

d. Because 1996 census estimates did not contain any estimated figures for the wards, Dr. Cupingood estimated the ward populations using an index he developed based on a count of housing permits. There is no evidence that his count of housing permits was accurate and the testimony and Affidavit of Dr. Illuzzi suggest it was inaccurate.

e. In developing the index, Dr. Cupingood utilized building permit information that was supplied to him or to his office by others. He did not personally count the building permits. Dr. Cupingood was not sure of the time period during which the permits were counted.

f. In determining his index to apportion population among the wards in Upper Chichester, Dr. Cupingood "assumed" a factor of 3.5 for each single home represented by permits and a factor of 2.5 for each town home represented by permits. There was no evidence presented that the factors utilized by Dr. Cupingood reflected actuality in the Township. Dr. Cupingood acknowledged that if he used a different factor, the relative growth among the wards in Upper Chichester Township would have been different.

g. The 1990 decennial census figures for the population of Ward 5 of Upper Chichester Township was 2,766. In his chart for estimated population as of July 1, 1997, Dr. Cupingood represented that the estimated population for Ward 5 was 2,780 as of July 1, 1997, Dr. Cupingood has testified that the figure did not take into account the change in ward boundaries that occurred in 1993 and which increased the size and population of Ward 5.

h. The lack of reliability of the population estimates published by the Census Bureau is reflected in the fact that the Census Bureau has issued different population estimates. For example, in 1994, the Census Bureau estimated the population of

Upper Chichester Township at 16,940 as of July 1, 1994. In 1996, the Census Bureau changed its July 1, 1994 estimates of population for Upper Chichester Township and now estimates the July 1, 1994 population at only 15,845, even though there was housing growth between 1994 and 1996. Indeed, the July 1, 1996 Census Bureau estimates for Upper Chichester Township show that the estimated population is 16,367, almost 600 fewer people than the Census Bureau estimated to be in Upper Chichester Township in 1994.

i. The Census Bureau has not established population levels for July 1, 1997. In order to extrapolate the Census Bureau estimates published for July 1, 1996 to population estimates effective July 1, 1997, Dr. Cupingood "assumed" an average annual growth of 1.5%. However, Dr. Cupingood acknowledged that: (1) that there was no empirical data to confirm that the growth rate was actually 1.5% from July 1, 1996 through July 1, 1997; (2) he has not looked at growth rates from year to year; and (3) there was no individual year in which the growth rate was 1.5%.

j. Dr. Cupingood did not consistently apply his adjustments. For example, he did not adjust the population of any township other than Upper Chichester Township for population changes between July 1, 1996 and July 1, 1997. According to the Census Bureau estimates, Lower Chichester declined in population between 1990 and 1996, yet Dr. Cupingood did not extrapolate that decline for 1996-1997.

k. Dr. Cupingood has not had any prior experience developing voting districts.

Plain and simply, the population estimates submitted by Dr. Cupingood are not "thoroughly documented," do not have a high degree of accuracy, are not clear, cogent, and convincing and are entirely and completely speculative. Therefore, the District Court and Third Circuit committed critical errors by accepting these figures as reliable.

The School Directors submit that it is important that Your Honorable Court hear this case and determine whether the Third Circuit's ruling is in accordance with Your Honorable Court's prior decisions in, most notably, *Reynolds, Karcher, and Kirkpatrick* and whether there are inconsistencies between the Third Circuit's decision and the decisions rendered by the Sixth and Seventh Circuits. It is so rare for a court to depart from using census figures, the law is unclear as to exactly what constitutes clear, cogent, and convincing evidence. This is yet another reason warranting a review by Your Honorable Court: to crystallize the clear, cogent, and convincing standard so that courts in the future can determine whether a party has met this high burden of proof.

## II. THE DISTRICT COURT AND THE THIRD CIRCUIT'S REJECTION OF THE SCHOOL BOARD'S ARGUMENT ON RES JUDICATA/COLLATERAL ESTOPPEL, ABSTENTION, AND ROOKER-FELDMAN BECAUSE THERE WAS NO PRIVITY BETWEEN THE PARTIES IN THE STATE COURT AND FEDERAL COURT ACTIONS WAS BASED ON A MISAPPLICATION OF THE LAW.

It is submitted that the District Court and Third Circuit erred by failing to dismiss the Taxpayers' Complaint on the basis of one or more of the following legal doctrines: Res judicata/collateral estoppel, Rooker-Feldman, and abstention. Central to the School Board's argument on all of these defenses is that there was privity between the parties to the State Court proceedings that concluded on February 26, 1997 and the Taxpayers at bar. Because the District and Circuit Courts ruled that there was no privity between the parties in the State and Federal Court actions,[6] they did not address

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6. In its January 30, 1998 Order, the District Court, citing one of its prior rulings, without analysis or explanation stated that the parties to the State Court action were not in privity with the parties to the federal action. The District Court referred to an Order it entered on July 10, 1997 (it erroneously stated June 10, 1997) (App. B., 28a.) That Order was *not* entered in the instant action; it was entered in the case of *Frattarelli, et al. v. Kelly, et al.*, a matter which was initiated

(Cont'd)

whether the res judicata/collateral estoppel, Rooker-Feldman, or abstention arguments barred the suit. However, it is submitted that the proper application of privity principles leads to the inescapable conclusion that there was privity and that the lower courts should have applied the doctrines of res judicata/collateral estoppel, Rooker-Feldman and abstention.

It has been widely recognized and acknowledged that there are "some circumstances in which legally distinct parties are so closely related they should be subject to" legal principles that govern any of them. *Doran v. Salem, Inc.*, 422 U.S. 922 (1975). Under the doctrine of virtual or adequate representation, a party may be bound by a judgment even though not a party if one of the parties is so closely aligned with his interest to be his virtual representative. Privity may be established by identification of interests, even where representation of those interests is not authorized. The privity inquiry should be flexible enough to acknowledge the reality of parties' relationships. *First Options of Chicago v. Kaplin*, 913 F. Supp. 377 (E.D. Pa. 1996). Courts have held that if the parties in two successive actions are in privity, the second action can be barred based upon the principles of res judicata/collateral estoppel, Rooker-Feldman doctrine, and abstention. *See Montana v. The United States*, 440 U.S. 147 (1979); *Focus v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (3rd Cir. 1996); *In re: Teltronics Services, Inc.*, 762 F.2d 185 (2nd Cir. 1985); *Gambrell v. Hess*, 777 F. Supp. 375 (D. N.J. 1991).

There is no fixed formula for determining when parties stand in privity with one another. In *Montana, supra,* Your Honorable Court discussed several of the factors which should be considered in determining if two parties are in privity. In *Montana*, a

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(Cont'd)
in March 1997 by the Taxpayers against both the School Board and the Delaware County Bureau of elections and its Director Joseph Kelly. The Bureau and Kelly filed a Motion to Dismiss which engendered the District Court's July 1997 Order dismissing that Motion. The Third Circuit erroneously believed that the District Court's July 10, 1997 Order was entered in the instant action. (App. A., 6a).

government contractor, at the direction of the United States, filed suit in Montana court attacking the constitutionality of Montana's imposition of a one percent gross receipts tax upon contractors of public, but not private, construction projects. After the Montana Supreme Court upheld the tax, at the Solicitor General's direction, the contractor abandoned its request for review by Your Honorable Court. Thereafter, in another suit challenging the constitutionality of the tax, also financed and directed by the government, the United States District Court for the District of Montana ruled that the United States was not bound by the Montana Supreme Court's decision. The state of Montana argued to Your Honorable Court that the prior judgment by the Montana Supreme Court upholding the tax precluded the United States from contesting its constitutionality. In its decision, Your Honorable Court made these salient points before resolving the issue:

> The interests underlying the related doctrines of collateral estoppel and res judicata — that a "right, question or fact distinctly put in issue and directly determined by a competent jurisdiction" . . . . cannot be disputed in a subsequent suit between the same parties or their privities . . . . — are similarly implicated when non-parties assume control over litigation to which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved * * * To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

440 U.S. at 147-148, 153-154.

Your Honorable Court then stated that although the United States was not a party, it plainly had a sufficient "laboring oar" in the conduct of prior state court litigation to actuate principles of estoppel. The Court noted that the United States: (1) required the

prior lawsuit to be filed; (2) reviewed and approved the complaint; (3) paid the attorneys fees and costs; (4) directed the appeal from state district court to the Montana Supreme Court; (5) appeared and submitted a brief as amicus in the Montana Supreme Court; (6) directed the filing of an appeal to Your Honorable Court; and (7) effectuated the contractors' abandonment of their appeal on the advice of the Solicitor General. On that basis, Your Honorable Court reversed and held that principles of collateral estoppel were properly invoked against the United States.

Applying the *Montana* holding to the facts in this case, it is clear, based on the following admissions elicited at depositions, that the Taxpayers stand in privity with the parties in the State Court action:

In a QUEST newsletter in May 1995, Mr. Buchholz stated QUEST's intention to petition the courts to realign the School Board. Mr. Buchholz acknowledged that after the School Board meeting in early 1996, when his motion to realign under the "five-three-one" plan was denied, he urged Joseph Dimarco to file suit in State Court seeking realignment. After Mr. DiMarco volunteered to be a plaintiff in the State Court suit, Mr. Buchholz literally took Mr. DiMarco to meet with lawyer Peter Rohana. At the meeting at Mr. Rohana's office which Mr. DiMarco and Mr. Buchholz attended, Mr. Buchholz agreed that QUEST would pay for the lawsuit. Mr. Rohana sent his bills to QUEST. Mr. Buchholz and QUEST funded the litigation by paying $7,500 in legal costs. During the litigation of the State Court action, Mr. Buchholz solicited funds from the Upper Chichester Township Commissioners. Mr. Buchholz testified at a Hearing before Judge Battle on August 6, 1996. After Judge Battle entered his first decision on August 16, 1996 approving the "five-four" plan, Mr. Buchholz stated in his newsletter, "We must appeal Judge Battle's decision." When Attorney Peter Frattarelli assumed legal representation of the State Court proceeding case at the appeal stage, the bills were sent to Mr. Buchholz. While the State Court case was pending before the Commonwealth Court, Mr. Buchholz spoke to Mr. Frattarelli about the case and provided Mr. Frattarelli

with information pertaining to population. Mr. Buchholz traveled to Harrisburg with Mr. Frattarelli and Mr. DiMarco to attend Oral Argument before the Commonwealth Court. Ms. Silva, counsel to the Taxpayers, filed an Amicus Curiae brief with the Commonwealth Court. When Mr. Frattarelli received the Commonwealth Court decision remanding the matter to Judge Battle on February 18, 1997, Mr. Frattarelli promptly faxed it to Mr. Buchholz. Of paramount importance, subsequent to the Commonwealth Court's decision, Mr. Levy, the School Board's solicitor, and Mr. Frattarelli engaged in discussions to resolve the case by tri-regional plan. When Mr. Levy faxed Mr. Frattarelli a counterproposal for a tri-regional plan, Mr. Frattarelli said he had to speak to some people, including Mr. Buchholz. and Ms. Silva. It was only after speaking to these people, that he got back to Mr. Levy and said that the tri-regional plan proposed by Mr. Levy was acceptable. After Judge Battle entered his Order on February 26, 1997, Mr. DiMarco had the option to file an Appeal with the Commonwealth Court. Mr. Frattarelli spoke to Mr. Buchholz before deciding to decline filing the Appeal.

While the other Taxpayers in the instant action did not formally participate by name in the State Court action as parties, they stated in their Complaint and at their depositions that they did one or more of the following: (1) became members of QUEST; (2) regularly attended QUEST meetings at which Mr. Buchholz presided; (3) signed the petitions supporting the State Court action; and (4) made financial contributions to QUEST — financial contributions that obviously contributed in part to fund the State Court action.[7]

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7. In fact, when the Taxpayers' counsel filed her Petition for Fees/ Costs with the District Court on July 15, 1998, entries on February 17, 1997 and February 18, 1997 respectively were "answer from Commonwealth Court" and "review Commonwealth Court opinion and conference with plaintiffs," which further supports the School Directors' argument that the Taxpayers and their counsel were inextricably linked with the State Court petitioners.

These examples, in and of themselves, make it abundantly clear that the parties in the two actions are inextricably linked by virtue of their involvement with Mr. Buchholz, Ms. Silva and QUEST. If the District Court had held Hearings on this issue as it should have,[8] the School Directors could have furthered bolstered its privity argument.

In rejecting the School Director's privity argument, the Third Circuit relied upon its decision in *Collins v. E.I. duPont Nemours and Co.*, 34 F.3d 172 (3rd Cir. 1994), for the principle that a pre-existing legal relationship between the parties must exist to create privity and that virtual representation requires a relationship legally designating representation of the non-party. (App. A., 18a-19a). That case involved a products liability class action suit brought against a manufacturer alleging that several individuals had sustained pulmonary disease. A subsequent suit was filed in federal court by some of the individuals who had been plaintiffs in the state court action as well as an individual who had not been a plaintiff in the state court action. The Third Circuit held that res judicata principles applied to the people who had been plaintiffs in the prior action but not to the individual who had not brought suit in state court. The Third Circuit emphasized that this individual had no relationship with the employees who brought the earlier suit other than that they worked at the same place, which was insufficient to create privity.

The School Directors submit that it was improper for the Third Circuit to rely on *Collins* as it is not analogous to the instant case. Clearly, the issue of privity in a products liability action is markedly different than in a voter reapportionment case. In a products liability action, each individual plaintiff suffers different injuries and therefore it would be grossly unfair to bind a certain plaintiff who had sustained injuries when he had not previously filed suit. Conversely, in a voter reapportionment case, every individual has the same goal: to realign the voting region in question in accordance

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8. This issue will be discussed further in Argument III.

with one man, one vote principles. Even though some of the federal plaintiffs may not have actively participated in the State Court litigation, it is incontrovertible that they had the same interest as DiMarco and individuals who lent assistance such as Buchholz. Thus, the School Directors submit, privity must be more broadly construed in a voter reapportionment case than other types of cases. The potential abuses by individuals are great if they can successfully bring multiple litigation against public officials and government entities simply by dividing their members among the different suits. Res judicata/collateral estoppel, abstention, and Rooker-Feldman doctrines are designed to prevent these types of abuses. The instant case is a textbook example of that abuse. When the State Court did not grant the precise relief which the federal plaintiffs were seeking, they continued to litigate their suit hoping that the District Court would grant them the relief that they sought. If the District Court did not grant them the relief they were seeking, according to the reasoning of the District Court and Third Circuit, another group of taxpayers which support Mr. Buchholz, Ms. Silva, and QUEST could file suit and respond to the res judicata, abstention, and Rooker-Feldman arguments by maintaining that they didn't participate in previous litigation.

The School Directors submit that this is a critical issue as voter reapportionment cases affect an entire community and it is vital that Your Honorable Court crystallize the law on these many legal doctrines and most importantly, clarify exactly what constitutes privity in a voter reapportionment case.

## III. THE DISTRICT COURT COMMITTED PROCEDURAL ERRORS BY FAILING TO TAKE EVIDENCE ON THE CRITICAL PRIVITY ISSUE AND GRANTING THE TAXPAYERS AN INJUNCTION WITH VIRTUALLY NO DISCUSSION ON THE CRITICAL ELEMENTS WHICH THEY WERE REQUIRED TO ESTABLISH IN ORDER TO BE GRANTED INJUNCTIVE RELIEF.

Review is also warranted by Your Honorable Court to examine a spate of procedural errors committed by the District Court. As emphasized herein, the privity issue was paramount to the School Directors' defense of res judicata/collateral estoppel, Rooker-Feldman, and abstention. Yet, the District Court held no hearings on the issue to ascertain the issue of the relationship between the parties. While the District Court scheduled a Hearing for September 4, 1997 in part on the School Directors' Motion for Summary Judgment in which they asserted all these defenses, the hearing amounted to nothing more than oral argument between counsel. No evidence on the privity issue, nor any of the issues pertaining to realignment, was taken. The District Court also failed to take evidence on the privity issue at the January 8, 1998 hearing. In *Fengler v. Numismactic Americana, Inc.*, 832 F.2d 745 (2nd Cir. 1989), the Court held that it is an abuse of discretion for a district court to refuse to hear relevant evidence on critical issues.

In fact, despite taking no evidence whatsoever at the September 4, 1997 hearing, the District Court issued an Order on September 10, 1997 summarily ruling that constitutional violations had occurred with regard to the alignment of the School Board. The District Court followed that Order on January 30, 1998 by finding that the School Board would be realigned pursuant to the Taxpayers' proposed tri-regional plan with an election to occur May 19, 1998. Yet, when it granted the Taxpayers injunctive relief, in its January 30, 1998 Memorandum and Order, the District Court discussed only briefly the four critical elements which the Taxpayers

were required to establish in order to be granted injunctive relief.[9] A court should not summarily grant a party injunctive relief without thoroughly discussing the party's likelihood of success on the merits, the relative harm to the parties and the public interest. The School Directors submit that the District Court avoided discussing these elements because the Taxpayers failed to make the requisite showing on any of these elements.

In the same vein, when a district court grants a motion for preliminary injunction, it must make findings of fact and conclusions of law. *TEC. Engineering Corp. v. Budget Molders Supply*, 82 F.3d 542 (3rd Cir. 1996). The requirement that a district court must make findings of fact and conclusions of law in an injunction action is mandatory and cannot be waived. *Francis v. Goodman*, 81 F.3d 5 (1st Cir. 1996). The District Court's January 30, 1998 Memorandum and Order fails to comply with these requirements as it is completely devoid of findings of fact and conclusions of law.

The District Court committed another procedural error by failing to require the Taxpayers to post security in contravention of F.R.C.P. 65(e), which provides, in pertinent part, as follows:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongly enjoined or restrained.

A security bond is required to be posted by the successful applicant for a preliminary injunction when the injunction raises a

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9. It is well settled that in order to be granted injunctive relief, a party must establish irreparable harm if the relief is not granted; a relative lack of harm to the non-moving party if the relief is granted; a likelihood of success on the merits; and that the public interests is not adversely affected F.R.C.P. 65; *Allessi v. Pennsylvania Department of Public Welfare*, 892 F.2d 142 (3rd Cir. 1990).

risk of monetary harm to the defendant. *System Operations, Inc. v. Scientific Ink Development Corporation*, 555 F.2d 1131 (3rd Cir. 1977). In the instant case, the risks of loss were substantial as there were costs attendant to new campaigns and new elections. If Your Honorable Court ultimately reverses the District Court, undoing the damage caused by new elections will be costly and difficult. Therefore, the District Court should have required the Taxpayers to post a bond in accordance with F.R.C.P. 65(c) and *System Operations, Inc.*

Thus, the procedural errors that the District Court committed were critical and constitute yet another reason for Your Honorable Court to review this matter.

## CONCLUSION

Because the decisions of the District Court and Third Circuit are inconsistent with decisions by Your Honorable Court and other Circuit Courts and because the law needs crystallization on issues pertaining to voter reapportionment cases, Your Honorable Court should grant the School Director's Petition for Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 27, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

*No. 98-1119*

GEORGE W. JAMES; WILLIAM BLANCHE; WILLIAM C. DUNKIN; DAVID G. SINGLES; MARK S. BETTNER; CHARLES KELLY, JR.; KEVIN J. KELLY; HENRY BUCHHOLZ; JESSE CARTER

v.

CHICHESTER SCHOOL BOARD; PATRICIA KOCH; JOHN S. LUPI; TERRY L. ADAMS, VICE PRESIDENT; BARBARA KERTIS, SECRETARY; MARY E. MAGAW, PRESIDENT; HAROLD ETSELL, JR.; E. BERNARD DEVLIN; G. DAVID LEE; SALVATORE J. ILLUZZI

Chichester School Board, Patricia Koch, John S. Lupi, Terry L. Adams, Barbara Kertis, Mary E. Magaw, Harold Etsell, Jr., E. Bernard Devlin, G. David Lee and Salvatore J. Illuzzi, Appellants

Present: Stapleton and Nygaard, *Circuit Judges*, and Schwartz, *District Judge*[*]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 23, 1998.

*Appendix A*

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 2, 1998, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: April 27, 1998

*Appendix A*

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1119

GEORGE W. JAMES; WILLIAM BLANCHE; WILLIAM C. DUNKIN; DAVID G. SINGLES; MARK S. BETTNER; CHARLES KELLY, JR.; KEVIN J. KELLY; HENRY BUCHHOLZ; JESSE CARTER

v.

CHICHESTER SCHOOL BOARD; PATRICIA KOCH; JOHN S. LUPI; TERRY L. ADAMS, VICE PRESIDENT; BARBARA KERTIS, SECRETARY; MARY E. MAGAW, PRESIDENT; HAROLD ETSELL, JR.; E, BERNARD DEVLIN; G. DAVID LEE; SALVATORE J. ILLUZZI

Chichester School Board, Patricia Koch, John S. Lupi, Terry L. Adams, Barbara Kertis, Mary E. Magaw, Harold Etsell, Jr., E. Bernard Devlin, G. David Lee and Salvatore J. Illuzzi,

Appellants

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 96-cv-07683)
District Judge: Honorable John P. Fullam

Argued April 23,1998

*Appendix A*

BEFORE: STAPLETON and NYGAARD, *Circuit Judges*, and SCHWARTZ,* *District Judge*

(Opinion Filed April 27, 1998)

OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

## I. Introduction

The Chichester School Board (the "Board") appeals from an order directing an election of school board members in May of this year pursuant to a plan of reapportionment of the school district. For the reasons that follow, we will affirm the district court's order.

## II. Background

Since 1967, the directors of the school board of the Chichester School District have been elected according to a nine-region plan adopted pursuant to section 303 of the Pennsylvania School Code, 24 Pa. Cons. Stat. Ann. § 3-303. The school district has undergone significant population changes during that time, however, which has gradually resulted in disparate voting power among electors in the nine individual regions. In June 1996, Joseph DiMarco and several other voters in the Chichester School District (referred to hereinafter collectively as "DiMarco") filed suit in the Pennsylvania Court of Common Pleas. DiMarco claimed that, given the demographic developments in the district, the nine-region plan no longer fulfilled the requirements

* Honorable Murray M. Schwartz, Senior United States District Judge for the District of Delaware, sitting by designation.

of section 303(b)(3) of the School Code, which requires that regional divisions within school districts have populations "as nearly equal as possible." He therefore proposed abandoning the regional system and instituting a new at-large voting regime to equalize voting power for citizens within the school district.

The Board preferred not to abandon the old system, but rather to adopt a plan of reapportionment that retained nine regions within the district. It therefore submitted a plan by which voting power could be more evenly distributed through combination and division of the existing regions. In August 1996, the trial court rejected DiMarco's proposition for at-large voting and accepted the Board's nine-region reapportionment plan. It ordered the plan to be implemented through gradual replacement of portions of the school board by way of elections in 1997 and 1999. DiMarco appealed this decision to the Commonwealth Court of Pennsylvania.

While the appeal was pending, several other citizens of the Chichester School District, headed by George James (referred to hereinafter collectively as "James"), filed suit in federal district court on November 18, 1996. James contended that the Board's plan accepted by the Court of Common Pleas violated the principle of "one person, one vote" protected by Article 1, Section 2 and the Fourteenth Amendment to the U.S. Constitution. He sought a declaratory judgment that the plan reapportioning the regions did not comply with the requirements of the Constitution, In addition, he requested preliminary and permanent injunctive relief to the effect that all actions taken by the current board be rescinded, including several employment contracts that the board had adopted, and that the nonconforming board be replaced through immediate tri-regional or at-large elections.

*Appendix A*

In February 1997, the Commonwealth Court vacated and remanded the trial court's decision in DiMarco's case with respect to the reapportionment plan. It held that the trial court had misinterpreted relevant Pennsylvania precedent on the construction of section 303 of the School Code, and it remanded for a more detailed evaluation of the Board's proposed reapportionment plan.

Subsequently, DiMarco and the Board agreed to a tri-regional compromise plan. After hearing testimony on the remaining dispute regarding the scheduling of implementation of the plan, in February 1997, the Court of Common Pleas approved the tri-regional plan and again directed that it be phased in through partial elections in 1997 and 1999.

In March 1997, James filed another action in the federal district court seeking a preliminary injunction instituting an at-large election in November 1997 and voiding the actions of the allegedly unconstitutionally elected incumbent board members. He contended that significant population growth in Upper Chichester had rendered the 1990 census figures inaccurate, and reliance on the old figures violated the "one person, one vote" principle. The current board members were therefore unconstitutionally elected, James argued, their actions in office should be declared void, and they should be removed and replaced through new elections based on a constitutional plan as soon as possible.

The Board moved to dismiss these new claims on the basis of res judicata, mootness, and various abstention doctrines. The district court rejected the Board's motion in July 1997. It concluded that none of the plaintiffs in the James federal action was a party or in privity with a party to the DiMarco case. For this reason, the court held that res judicata did not apply. It also ruled that none of the various abstention doctrines applied under

the circumstances. Finally, while James's challenges to the former nine-region plan were moot by virtue of acceptance of the new tri-regional plan, his constitutional challenge to that new plan and the protracted schedule for its implementation remained to be resolved.

In September 1997, the district court turned to James's requests for injunctive relief. It began by acknowledging that population shifts do not by themselves require reapportionment prior to the next ensuing decennial census. The court held, however, that when a state chooses to reapportion between censuses, it cannot, consistent with the one-man, one-vote rule, ignore significant population shifts in its reapportionment process. This holding is not challenged before us.

The district court went on to find that the 1990 decennial census figures, upon which the tri-regional plan accepted by the state court was based, were several years old, and that significant population shifts had occurred in the intervening years and would continue through 1999, when the plan was to be finally implemented. Although the problem could not be remedied at the impending November 1997 election, the court perceived no reason for extending the unconstitutional term of the present directors until 1999. Therefore, the court directed the parties to "confer with each other (and, if they deem it appropriate, with the state court and the parties to that litigation) to achieve a plan under which all nine members of the school board would be elected, from three regions of approximately equal population, at either a primary, or special election to be held in early 1998." Sept. 10, 1997, Mem. Op. at 4. Counsel for each side was directed to report back to the court by December 1, 1997, with the plan or plans resulting from their collaborative efforts. In all other respects, the court denied James's motion for preliminary injunctive relief.

*Appendix A*

On January 30, 1998, the district court issued its final memorandum opinion and order. It recognized its duty to remedy the constitutional violation it had found promptly and effectively. To that end, it analyzed and compared James's and the Board's proposed plans. The court acknowledged that the decennial census produces the most reliable population figures at the turn of each decade. It also observed that the Census Bureau makes annual estimates of population growth albeit not for subdivisions of municipalities like wards and precincts. The population estimates tendered by James's expert were based on this Census Bureau data, and the court was "persuaded that [James's updated] figures for the July 1, 1997 population of each of the municipalities of the school district are reasonably accurate and should be the basis for an appropriate reapportionment plan." Jan. 30, 1998, Mem. Op. at 11. It rejected the Board's estimates as not sufficiently accurate because it disagreed with the Board's expert's methodology for estimating population and allocating the estimated population among wards and precincts. The court expressed a preference for James's plan because it required fewer allocations of the Census Bureau's regional population estimates among wards and precincts, and because it separated the two fastest growing areas of the school district to minimize current error and population disparity going forward. As a result, the court concluded that James's plan was the most likely to achieve actual equality among the regions. The court also noted that all three regions of the James plan were contiguous.

Before concluding, the court remarked that "[a] further factor bears mention: under [James's] plan, the two geographical areas having substantial minority populations are contained within a single region." *Id.* at 14-15. The Board's plan separated the concentrations of minority populations and "it seems desirable, all else being equal, not to create the impression that" the plan

was intentionally devised to dilute the minority voting power. *Id.* at 15.

With respect to the timing for implementation of the remedy, the district court concluded that the terms of all incumbent board members should expire on July 1, 1998, and that three successors should be chosen at an election to be held in connection with the May 1998 primary election. After concluding that this implementation schedule should be required and holding that James's plan provided, in its judgment, the greatest assurance of actual equality among the three regions, the court acknowledged that the state had an interest in the choice among remedial plans. As a result, it believed that considerations of comity counseled that the Board should be afforded a final opportunity to propose, and the Court of Common Pleas an opportunity to select, a remedial plan so long as that plan met all statutory and constitutional requirements.

For the reasons stated in its opinion, the district court issued an injunction mandating that:

> 1. The terms of the School Board incumbents will expire on June 30, 1998;
>
> 2. Their successors will be elected at an election to be held in connection with the May 1998 primary.
>
> 3. This election will be on the basis of "the Final Reapportionment Plan."
>
> 4. The defendants shall do everything necessary to implement the "Final Reapportionment Plan."

5. The court was retaining jurisdiction "over all matters of implementation of the foregoing."

Based on its comity concerns, the district court fashioned a definition of the term. "Final Reapportionment Plan" that would afford plaintiffs a remedy pursuant to James's plan if the Board took no further action, but would alter that federal remedy to conform to any plan subsequently approved by the Court of Common Pleas of Delaware County which met stipulated criteria. The court defined "the Final Reapportionment Plan" to mean:

> the *primary plan* submitted by the plaintiffs . . . unless
>
> A. Within ten (10) days of the date of this order, the defendants or persons acting on their behalf petition the Court of Common Pleas of Delaware County for approval of plaintiffs' "alternate plan" described above, or another plan which differs from the plans previously submitted to the state courts, and which complies with statutory and constitutional requirements, and
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> B. The Court of Common Pleas of Delaware County approves either plaintiffs' primary plan or plaintiffs' alternate plan or some other plan that meets all constitutional and statutory requirements, and causes its plan to be implemented by a valid special election to be held in conjunction with the May 1998 primary election.

Subsequently, the Board submitted three plans to the Court of Common Pleas. The court rejected the Board's first plan, which was based on nonupdated 1990 decennial census figures, the use

of which "results in an unconstitutional plan." Slip Op. at 4. It "adopt[ed the district court's] reasoning . . . in rejecting any plan which is based upon the 1990 census figures [because] there ha[d] been too great of a shift of population since the 1990 census." *Id.* It also agreed with the district court's conclusion that James's expert's methodology was "preferable to that of the school board to determine population," Slip Op. at 7, so it rejected the Board's second plan, based on updated figures, as well.

The Court of Common Pleas acknowledged that the Board's third plan met constitutional standards, but it reiterated its preference for the methodology applied by James's expert, who had proposed switching two of the precincts in the Board's third plan to achieve greater equality. Therefore, the court accepted the Board's third plan with the amendment proposed by James's expert ("James's alternative plan"). On March 13, 1998, the Court of Common Pleas entered an order 1) terminating the tenure of all nine current Board members as of June 30, 1998; 2) ordering the vacancies to be filled at a special election in conjunction with the May 1998 primary election; 3) dividing the district into three regions in accordance with James's alternative plan; 4) directing potential candidates for the Board to file nominating papers by March 30, 1998; and 5) staggering the terms of those elected in May 1998 between two and four years. The Board's appeal from this order is currently pending before the Commonwealth Court.

## III. Jurisdiction

James contends that the district court's September 1997 order constituted a preliminary injunction, and because the Board elected not to appeal that order immediately, it is now foreclosed from challenging any of the determinations underlying that order. The September order, however, was not an immediately

appealable preliminary injunction; it simply directed the parties to confer and submit plans as a presage to the final and specific determination of the appropriate relief, Moreover, the determinations underlying that order were reevaluated and incorporated into the court's final order in January 1998. Accordingly, the court's January 1999 order granting final injunctive relief, which encompasses all of the issues raised in the Board's appeal, constitutes a final decision that we had jurisdiction to review at the time of the filing of the notice of appeal under 28 U.S.C. § 1291.

After the filing of the notice of appeal in this case, the Court of Common Pleas entered a final judgment in a related proceeding between the same parties. Before proceeding to the merits of this appeal, we must determine what effect, if any, that intervening state court judgment has on our jurisdiction.

It is apparent from the provisions of its injunction that the district court, as explained in its opinion, made a final determination that the reapportionment plan agreed to in the DiMarco settlement was unconstitutional and that the plaintiffs were entitled to relief at a special election in May 1998. There was nothing conditional about these determinations, and the district court did not contemplate a state proceeding to review these determinations. The district court invited the parties to seek state court participation only in the decision as to the apportionment plan to be implemented as a remedy for the constitutional violation. If a state court approved plan meeting the stipulated requirements became available in time to be implemented at the May election, the district court provided for its incorporation in the federal remedy.

It is important to note two things about precisely what it was that was incorporated by the district court. First, realizing that

there was time, at best, for a proceeding in the Court of Common Pleas, the district court referred only to approval by that court. Second, it imposed conditions on that approval — to be incorporated a state endorsed plan had to meet specified standards. The district court intended that in the factual circumstances now existing, the May election would be conducted in accordance with the plan approved in the order of the Court of Common Pleas, and that any dispute as to whether that plan had met the standards specified by the district court would be brought to the district court so that it could exercise its retained jurisdiction to clarify its judgment.

In these circumstances we can only view the federal judgment before us as binding on the Board. The Court of Common Pleas has approved a plan, no question has been raised before the district court as to whether that plan meets the specified criteria, and that plan is the "Final Reapportionment Plan" within the meaning of the federal judgment. Accordingly, if the Board should fail to do everything feasible to implement James's alternative plan in May, it would be subject to citation for contempt in the district court. Under these circumstances, we conclude that the Board has a right to have this court review the propriety of the entry of the district court's judgment.

We perceive no theory under which the March 1998 order of the Court of Common Pleas can be regarded as vacating the district court's injunction. We believe there can be no dispute, for example, that had the Court of Common Pleas purported to defer the election or had approved a plan previously found by the district court to be unconstitutional, the district court would have expected, and insisted, that the Board go forward in May in accordance with its order. If the Board can be held in contempt if it violates the injunction before us for review, its interest in seeing it reversed clearly prevents this appeal from being moot.

Nor do we think that *Rooker-Feldman* precludes our review of the district court judgment. In the typical *Rooker-Feldman* situation, a federal plaintiff is asking a district court to undo a previously entered, adverse judgment of a state court, We have explained that such cases must be dismissed for three reasons. First, "[d]istrict courts lack subject matter jurisdiction once a state court has adjudicated an issue because Congress has conferred only original jurisdiction not appellate jurisdiction on the district courts." *Guarino v. Larsen*, 11 F.3d 1151, 1156-57 (3d Cir. 1993). Second, comity requires that where a state court has previously decided the same questions being presented to a federal court, the federal court should "presume that [the] completed state court proceedings have correctly resolved these questions." *Id.* at 1157. Finally, the state has a substantial interest in the finality of its previously entered judgment. Like issue and claim preclusion, *Rooker-Feldman* is also concerned with losing parties taking "multiple bites from the same apple." *Id.*

Application of these principles underlying the *Rooker-Feldman* doctrine is illustrated by our recent decision in *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998). The appellants there had asked the district court to enjoin a proceeding in Louisiana. The district court refused to do so, and an appeal was taken to this court. While the appeal was pending, a final judgment was entered in the state proceedings. As a result, appellants were forced to ask this court to remand with instructions to "the district court to vacate the Louisiana court's final judgment." *Id.* at 141. We concluded that this relief could not be granted consistent with the federal Full Faith and Credit Act, 28 U.S.C. § 1738, and the *Rooker-Feldman* doctrine. We reviewed the three bases for the *Rooker-Feldman* doctrine; all were implicated. The district court lacked subject matter jurisdiction

to vacate a state judgment. Moreover, "in order for us to grant appellants' requested relief, we would first have [been required] to determine that the state court judgment was erroneously entered." *Id.* at 143 (quoting from *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir 1996) ) (internal quotation marks omitted). Finally, the state had a legitimate and substantial interest in the finality of its judgment.

In this case, the plaintiffs in the district court did not seek to enjoin a state proceeding or to vacate a state judgment. Rather, at a time when no state proceeding was in progress, they asked to have the process for electing the members of their school board declared invalid under the federal constitution. The plaintiffs were successful and a federal mandatory injunction was entered against the school board defendants. The school board defendants have now appealed, insisting that the federal judgment was improperly entered. They ask that we exercise our appellate jurisdiction to review this federal judgment that they must obey on pain off contempt, They do not ask that we vacate the judgment of the Court of Common Pleas, a judgment from which they are seeking relief in the Commonwealth Court.

Where a federal mandatory injunction is outstanding and not subject to collateral attack, we doubt that there are any circumstances in which *Rooker-Feldman* will deny a party, subject to the coercion of that judgment, his or her right to appellate review under §§ 1291 and 1292. But if such circumstances exist, they are not present here where neither the state's interest in the finality of its judgment nor concerns of comity are implicated, and where there is a substantial federal interest in assuring that the federal judicial process is properly employed.

Here, the federal court adjudicated all of the federal issues before a state proceeding was commenced, determined that a

prompt remedy was required, and deferred on grounds of comity only with respect to the choice among remedial plans that met both the federal and state requirements regarding apportionment. The Court of Common Pleas has not readjudicated the federal issues that were decided by the district court, and we can review the rulings that led to the final judgment without determining that the Court of Common Pleas erred in the plan of reapportionment that it chose as the most desirable one. Although the Court of Common Pleas may have taken into consideration the views of the district court as to the parameters of a constitutionally permissible plan, we do not believe it would offend comity or the state's interest in the finality of its judgment for the district court or for this court to determine whether or not the plan chosen by the Court of Common Pleas meets the criteria established for incorporation in the district court's judgment.

Because this appeal will not lead to a vacation of the state judgment or a determination that the state court erred, and because we are obligated to see that federal injunctive process is properly employed, we decline to apply the *Rooker-Feldman* doctrine here. Accordingly, we now turn to the merits of this appeal.

## IV. Res Judicata, Abstention, Mootness, and *Rooker-Feldman*

The Board contends that the February 1997 state court order approving the DiMarco compromise plan and implementation schedule precluded James from raising any further challenges to the reapportionment plan and its implementation. It argues that the district court was prohibited from addressing James's arguments by the doctrines of res judicata, mootness, and *Rooker-Feldman*. Alternatively, the Board maintains that the district court should have abstained from hearing James's claims

during the pendency of an appeal in the state proceedings under a variety of doctrines.

### A. Res Judicata,[1] Abstention, and *Rooker-Feldman*

The Board's arguments on these issues suffer from a common flaw. Res judicata, abstention, and *Rooker-Feldman* apply to successive and concurrent litigation between the same parties and those in privity with them. The federal plaintiffs, however, were not parties to the state court action, and the record developed by the Board contains no competent evidence that, if accepted, would support the conclusion that all of the federal plaintiffs were in privity with DiMarco. Since the district court judgment must stand if any plaintiff was entitled to relief from that court, this deficiency disposes of each of these contentions.

The Board attempts to portray the federal and state plaintiffs as members of a group of citizens that conspired to bifurcate the attack on the reapportionment plan. It argues that they operated essentially as one unit, the individual members of which should be bound by adjudication of a claim brought by other members in the state court. The loose record connections between the two sets of plaintiffs in this case, however, are far from sufficient to bind the federal plaintiffs to the determinations in the state court.

Pennsylvania case law contains only general remarks concerning privity. The most instructive case for present purposes is *Day v. Volkswagenwerk Akfiengesellsch* 464 A.2d 1313 (Pa. Super. 1983). The Pennsylvania Superior Court there noted that "[p]rivity for purposes of res judicata is not established by the

1. The Board also refers to (but does not press) collateral estoppel, but since it does not dispute that the state court did not actually address or adjudicate the constitutional issues raised by James, we will disregard this reference to an inapplicable doctrine.

mere fact that persons may be interested in the same question or in proving the same facts." *Id.* at 1317.

The most pertinent federal precedent is *Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172 (3d Cir. 1994), in which the court examined the Restatement (Second) of Judgments, which had been followed by the New Jersey Superior Court. The Restatement has also been followed by the Pennsylvania Superior Court, *see Day,* 464 A.2d at 1317. Collins was an employee of a manufacturing plant who, along with forty-nine other employees, contracted pulmonary injury from a substance to which they were exposed on the job. All of the employees but one had sued DuPont previously on a related cause of action, and the court dismissed this subsequent suit on res judicata grounds. This court affirmed the dismissal as to all but one of the employees, Wojenski. Wojenski had not sued before, and the court found that he was not in privity with the other employees and could not therefore be bound by the previous adverse judgment against them.

The court found that none of the three potential ways of establishing privity had been established. First the other employees could not be deemed to have "virtually represented" Wojenski because no legal relationship bound the employees. The court noted that section 41 of the Restatement identifies those parties who may be said to represent an absent person, including the trustee of an estate in which the person has an interest, those specifically authorized to represent the person in an action, the executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary, an official or agency vested by law with authority to represent the person's interests, or the representative in an action on behalf of a class of which the person is a member. *Id.* at 177. The *Collins* court held that a "pre-existing legal relationship is not only a

sufficient condition for privity to exist, but it is also a necessary one." *Id.* Wojenski's identity of interest with and even his use of the same attorney as the other employees was insufficient to show that the other employees had "virtually represented" Wojenski in the previous actions to establish privity. Second, Wojenski could not be deemed to have "control[led] or substantially participate[d] in the control of" the prior litigation under section 39 of the Restatement, Finally, the prior litigation was not certified as a class action, so Wojenski could not have been a member bound by its result.

The Board appears to argue that both the state and the federal litigation were orchestrated by an informal taxpayers' organization called Quest, headed by Henry Buchholz, a plaintiff in the federal case. In support of its motion for summary judgment, the Board submitted to the district court 280 pages of documentary evidence of the connections between Quest, Buchholz, and the other federal litigants to the state court action.

The record reveals that the Board failed to carry its burden of coming forward with evidence that each of the federal plaintiff was in privity with DiMarco and should be bound by the state court judgment. Although Buchholz, through his organization Quest, appears to have played a major role in encouraging and funding DiMarco's suit, the record contains precious little evidence of any connection between Quest, the state litigation, and several of the other federal plaintiffs. For example, the Board's submissions contain no information regarding Charles Kelly, Jr.;[2] William Blanche is not a member of Quest, is unfamiliar with tile details of the organization's mission, but may have made "a few contributions" to Quest for an unknown amount, *see* App. at

2. James's submissions reveal only that Kelly, Jr., is reported to have attended one Quest meeting in April 1997.

205; and Jessie Carter is not a member of Quest but attended one meeting in March 1997 and made a $25.00 contribution to Quest in October 1996. The evidence of a connection between many of the other federal plaintiffs and the state litigation is similarly sparse. The simple fact that all of the plaintiffs shared a common interest in redressing the disparities in electoral power in the Chichester School District is clearly insufficient to establish privity, and the Board failed to adduce any other indicia of a more significant factual or legal relationship among the two sets of plaintiffs. The district court properly rejected the Board's overbroad arguments based on the federal plaintiffs' attenuated connection to an informal interest group. Because the federal plaintiffs were not in privity with the state plaintiffs, res Judicata, abstention, and *Rooker-Feldman* do not preclude them from bringing their claims.

### B. Mootness

When James filed this case, he attacked the proposed nine-region plan and its implementation schedule. Because the parties adopted a compromise plan centered on a three-region plan, the Board argues that James's action was moot, First, the Board ignores what the district court acknowledged, *i.e.*, even if James's challenge to the nine-region plan was moot, his challenge to the protracted implementation schedule was definitely not. Moreover, James specifically challenged the tri-regional plan in his second Complaint on the same principles he had relied upon initially. The district court correctly rejected the Board's claims of mootness.

## V. James's Expert's Population Estimates

The Board acknowledges, as it must in light of the indisputable record evidence, that there has been substantial

population growth in the district since the 1990 census. It insists that the 1990 census data must be used here in fashioning a remedial plan, however, because the parties, in the Board's view, have been unable to provide "clear, cogent and convincing evidence" of the amount of that growth and its distribution. We are unpersuaded.

The district court was required to fashion a remedial plan such that "as nearly as is practicable" each school board member will cast a vote on behalf of the same number of people. See *Kirkpatrick v. Priesler*, 394 U.S. 526, 527 (1969) (quoting *Wesberry v. Sanders* 376 U.S. 1, 7-8 (1964)) (internal quotation marks omitted). It had before it expert evidence of current population size and distribution based upon Census Bureau endorsed population estimates supplemented, where necessary, by extrapolation in accordance with reasonable, objective criteria. The court found that evidence to be the best available evidence of current population size and distribution and reasonably accurate. It had a choice between using that evidence to formulate a plan based on current population or ignoring the indisputable evidence of material population growth and fashioning a plan based on concededly obsolete data. We believe its choice of the former is more consistent with the overall objective of achieving one man one vote "as nearly as practicable."

In *Kirkpatrick*, the Supreme Court recognized that estimates of current population can be utilized in legislative apportionments so long as they are objectively based and consistently applied, and not a cover for deviations from the ideal based on political or other extraneous concerns:

> We recognize that a congressional districting plan will usually be in effect for at least 10 years and five

> congressional elections. Situations may raise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc* manner. Missouri's attempted justification of the substantial underpopulation in the Fourth and Sixth Districts falls far short of this standard. The District Court found "no evidence . . . that the . . . General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district, in enacting the 1967 Act.

*Id.* at 535.

In this case, the population estimates of James's expert were objective, thoroughly documented, and applied in a systematic manner. James's expert submitted voluminous documentation of his methodology, and be described in great detail his reasons for taking his particular approach. He began with regional estimates through 1996 from the Census Bureau, and he divided the regional estimates into wards and precincts where necessary using an index based on account of housing permits — the same data and methodology most recently used by the Census Bureau in arriving at the regional estimates. To bring the estimate up to mid-1997, Jarnes's expert compared the average annual growth rate reported by the Census Bureau for 1990-1996 to his growth estimates for the first half of 1997 based on a recent count of housing permits, and since the numbers corresponded, he estimated the growth in the first half of 1997 to be consistent with the Census Bureau's

average annual estimated growth. We hold that the district court was entirely justified in relying upon James's expert's estimates rather than on obsolete data from the 1990 census.[3]

## VI. Consideration of Race

The Board contends that the court erred in allowing consideration of race to influence its choice of a plan. However, the Board's own authority clearly states that the court may be conscious of race in evaluating competing plans — problems arise only if racial considerations are "dominant and controlling" in the formulation of a plan. *See Shaw v. Hunt*, 116 S. Ct. 1894, 1900 (1996); *Miller v. Johnson*, 515 U.S. 9001 901, 913 (1995); *see also Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194-95 (1997); *Abrams v. Johnson*, 117 S. Ct. 1925, 1936 (1997). The Board does not claim that racial considerations were "dominant and controlling," and its contention that mere mention of race constitutes reversible error is refuted by its own authorities.

## VII. Procedural Prerequisites to Preliminary Injunction

The Board faults the district court for failing to apply the requirements in Fed. R. Civ. P. 52 and 65 when it granted its "preliminary injunction" in entering its January 1998 order. We do not understand the district court to have granted anything in

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3. We find nothing in the court of appeals cases relied on by the Board which dictates that a court fashioning a remedial plan for an area that has experienced substantial growth since the last decennial census must employ data from that census rather than reasonably based estimates of current population. In the cases cited by the Board, the courts concluded that the use of interim estimates in place of data from the last decennial census was *not constitutionally required.*

the nature of a preliminary injunction in January 1998 to which the requirements of Rules 52 and 65 would apply. The order then entered was a final mandatory injunction for which no bond was required. The findings of fact and conclusions of law supporting that injunction are adequately set forth in the district court's opinion.

## VIII. Factual Inaccuracies

The Board contends that a number of alleged factual inaccuracies in the district court's opinion reveal that the court abused its discretion by basing its conclusion on faulty factual premises. While the district court's characterization of the various proceedings and the Board's plans might not have been entirely accurate, none of these inaccuracies individually or in the aggregate undermines our confidence in the basis for the district court's conclusion.

## X. Pennsylvania Elections and School Codes

Finally, the Board contends that the court's order mandating reelection of the entire board at the May special election violated the Pennsylvania Elections and School Codes, which provide that the Board is normally reelected in November on a staggered schedule, four members at a time. Nothing in either of these codes, however, expressly forbids a court from ordering extraordinary relief in the case of an unconstitutionally elected Board. Moreover, the Supremacy Clause elevates the Constitution over state law, and unconstitutionally elected directors cannot rely on a mandate under state law to continue their unconstitutional tenure. The district court's inherent power to fashion appropriate equitable relief adequately supported its order here, and even if the state law were to the contrary, federal law would override it.

*Appendix A*

## X. Conclusion

For the foregoing reasons, we will affirm the district court's order.

TO THE CLERK:

Please file the foregoing opinion.

s/ Walter K. Stapleton
Circuit Judge

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 30, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-7683

GEORGE JAMES, et al.

v.

CHICHESTER SCHOOL BOARD, et al.

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CIVIL ACTION

NO. 97-1663

SANTA FRATTARELLI, et al.

v.

JOSEPH P. KELLY, et al.

MEMORANDUM AND ORDER

Fullam, Sr. J. January 30, 1998

BACKGROUND

The Chichester School District comprises the Townships of Upper Chichester and Lower Chichester, and the Boroughs

of Marcus Hook and Trainer. In recent years, the Township of Upper Chichester, which had been largely rural and sparsely populated, has experienced rapid growth in population, as housing developments have proliferated.

Since the 1960's, the school district has been governed by a Board of Directors, nine in number, each elected from one of nine "regions." It became apparent after the 1990 decennial census, and had been generally known before that event, that the nine regions varied greatly in population. Applicable Pennsylvania law requires that such regions be compatible with the boundaries of election districts, and as nearly equal as possible in population, 24 P.S. §3-303 (b) (3); and, of course, the citizens of the school district have a constitutional right to nearly equal voting power. In 1996, a group of citizens brought suit in the Court of Common Pleas of Delaware County to rectify the situation. The reapportionment plan which eventuated was appealed to the Commonwealth Court, which remanded to the trial court with instructions to determine whether that plan created the most equal regions possible under the circumstances. *See in re Petition to Reapportion the School Director Regions of the Chichester School District*, 688 A.2d 1275 (Pa. Commw. 1997). The parties then agreed upon a settlement of the litigation, which produced a tri-region plan that was subsequently approved by the Court of Common Pleas.

By this time, another group of citizens had brought suit in this court, charging that the plan produced by the settlement did not meet federal constitutional requirements. Their principal objections were that the proposed plan was based upon 1990 census figures, whereas significant population changes had occurred in the interim; and that implementation of the plan would be too long-delayed.

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The defendants sought dismissal of the federal action on the basis of the alleged *res judicata* effect of the state court settlement, and also on the theory that this court lacks jurisdiction over the reapportionment issue, and, in any event, should abstain from considering the matter. On June 10, 1997, I denied the motion to dismiss. I reasoned that the plaintiffs in the federal action were not parties to the state court action, nor were they in privity with the plaintiffs in that case. Moreover, no federal constitutional issues had been considered by the Court of Common Pleas or the Commonwealth Court, which were solely concerned with whether the proposed plan met the requirements of the Pennsylvania School Code. This Court plainly had jurisdiction to decide constitutional issues — plaintiffs' claim was based upon 42 U.S.C. §1983 — and there was no basis for abstention: there was no pending state court litigation at that point, or any unresolved issue of state law.

After the motion to dismiss was denied, plaintiffs' counsel filed a second action in this court, Civil Action No. 97-1663, adding more parties and seeking additional relief. In combination, the two actions sought to have this court immediately declare that the nine incumbent directors' continued tenure was unlawful, and order a special election at which all nine positions would be filled by an at-large election. Plaintiffs also sought to enjoin the incumbent directors from acting upon various important matters then pending, and to invalidate various contractual arrangements previously adopted.

After an evidentiary hearing, I entered an Order on September 10, 1997, which (1) rejected all of plaintiffs' requests for preliminary injunctive relief except with respect to the need for prompt action to achieve the election of school board members in a constitutionally acceptable manner; (2) found that

plaintiffs' constitutional rights, and the rights of all citizens of the Chichester School District, were being infringed by the manner in which the incumbent directors had been chosen; and (3) found that implementation of the settlement achieved in the state court litigation would result in continuing violations of these constitutional rights, in part because of the near-certainty that using 1990 census figures would not achieve present-day equality of voting power, and also because the constitutional violations should be remedied as soon as practicable, rather than be delayed until late 1999. I ordered the parties to attempt to agree upon a constitutionally valid tri-region plan, and to submit such a plan to this court by December 1, 1997 (or, if they were unable to agree, to submit competing proposals by that date). The Order contemplated that a new Board of Directors would be elected in accordance with whichever plan was approved, either at a special election to be held early in 1998, or at the May 1998 primary. A hearing was scheduled for early December, to consider the plan or plans submitted. No appeal was taken from that Order.

The parties were unable to agree upon a suitable plan. Plaintiffs submitted proposals in conformity with the December 1, 1997 deadline. Instead of complying with the September 10th Order, the defendants filed a new action in the Court of Common Pleas of Delaware County, asking that court to approve a plan which had been adopted by the school board, without consultation with the plaintiffs. Plaintiffs then removed the state court action to this court, and defendants filed a motion for remand. Plaintiffs also sought contempt citations.

These issues were aired at a brief hearing in this court. I ruled from the bench that regardless of whether the latest state court action had been properly removed, remand would be

pointless, as continuation of that proceeding would unduly interfere with this court's exercise of jurisdiction over the constitutional issues; and that the defendants should forthwith comply with the September 10th Order by submitting their proposed plan to this court.

On January 8, 1998, I held a hearing on the merits of the various plans submitted by parties.

## DISCUSSION

### 1. *Jurisdictional Issues*

A principal contention of the defendants is that this Court should reconsider the June 10, 1997 denial of defendants' Motion to Dismiss, as well as the Court's ruling of September 10, 1997 requiring the submission of proposed reapportionment plans. As noted in my earlier rulings, plaintiffs brought these actions to vindicate their constitutional rights. I am not aware of any basis for declining to rule upon the constitutional issues asserted: constitutional claims have not yet been addressed in any state court; and, when the claims were first presented to this Court, no state court litigation was pending, hence there was no basis for abstention. At a minimum, therefore, it is necessary for this Court to reach a decision as to whether plaintiffs' constitutional rights are indeed being violated and, if so, to devise an appropriate remedy.

Of course, defendants are correct in noting that the method of choosing school board members is, under Pennsylvania law, a matter committed to the school authorities in the first instance, with review by the state courts. In resolving the constitutional issues which this Court must decide, the requirements of state

law must be observed and due deference must be accorded the action and decisions of the state authorities. This means, at a minimum, that this Court must defer to the findings by the state authorities to the effect that the appropriate format for choosing the school directors for the Chichester school district is to elect three directors from each of three regions of substantially equal population. And, of course, the statutory requirements that regional boundaries must coincide with the boundaries of voting districts must be complied with.

But it is equally clear, in my view, that when an ongoing violation of constitutional rights is established, a prompt and effective remedy is mandatory, and the normal schedule of elections can and should be altered, if that can be done without imposing unreasonable burdens upon state governmental entities.

I also agree with defendants on the proposition that changes in population patterns which occur in the years between decennial censuses do not make interim reapportionment necessary, as a matter of constitutional law. It may well be, therefore, that if this Court were being asked to mandate reapportionment of the school district merely because the number and distribution of its population have changed since 1990, plaintiffs should not prevail. Here, however, the re-districting and reapportionment have been mandated by the state courts, pursuant to state law. The issue before this Court is not whether the constitution requires such re-districting, but rather, whether it is permissible to achieve the required redistricting in disregard of constitutional requirements. To say that, as a matter of practical convenience, some probable inequality in voting-power toward the end of a decennial census period must be tolerated, is not to say that, when redistricting is being carried

out, substantial changes in population numbers and distribution, which everyone knows about, and which can be demonstrated with reasonable accuracy, can be ignored.

On the record before this Court, there can be no doubt that the nine-region plan under which the incumbent school directors were elected produced clear violations of the one-man one-vote principle. Indeed, the state courts have already determined that the statutory requirement of equal-sized regions is not being met. There is no contention by anyone in this case that the selection of the present incumbents was constitutionally acceptable. That being so, prompt corrective action is required, and the only issue is how, and when, compliance with constitutional requirements can best be achieved.

2. *Determining the correct population figures for the proposed three regions.*

According to plaintiffs, the total population of the school district, as of July 1, 1997, is 25,941. Of that number 16,613 reside in Upper Chichester Township, and the remaining 8,328 reside in the remainder of the district, i.e., Lower Chichester, Marcus Hook and Trainer.

According to the defendants, the total population of the school district as of November 1997 is 26,432. Of that number, 17,955 reside in Upper Chichester, and 8,477 in the remaining three municipalities. Defendants' expert has acknowledged, however, that the figures for Upper Chichester Township may well be somewhat over-stated.

Regardless of which set of figures is accepted as most nearly accurate, all parties agree that two-thirds of the population of

the school district reside in Upper Chichester, and one-third in the balance of the school district.

Plaintiffs have presented two apportionment proposals. The first, or "primary" plan, merely divides Upper Chichester Township into two equal regions, and leaves the balance of the district to constitute the third region. Under that plan, Region I would consist of the second and third wards and the second precinct of the first ward of Upper Chichester, and would have a population of 8,310. Region II would consist of wards four and five and the first precinct of ward one of Upper Chichester, and would have a population of 8,303. Region III, the balance of the district, would have a population of 8,328.

Plaintiffs' second or "alternate" plan would divide the township vertically, so that each of the three proposed regions would have portions of Upper Chichester Township, and portions of the remainder of the district. Under either of plaintiffs' proposals, the residents of Upper Chichester Township would have a voting majority in two of the three regions.

Defendants have also advanced two alternate proposals. Under both plans, each of three regions would consist of portions of Upper Chichester Township and other municipalities on the basis of defendants' population estimates. Region I would combine portions of Upper Chichester and Lower Chichester with the Borough of Marcus Hook, and would have a population of 8,700. Region II would combine portions of Upper and Lower Chichester with the borough of Trainer, and would have a total population of 9,052. And Region III would consist of the third and fourth wards of Upper Chichester, with a total population of 8,680.

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As an alternative, the defendants propose the plan which is the product of the settlement agreement achieved in state court in February 1997. Under that plan Region I would have a population 7,767, Region II would have a population of 7,910 and Region III would have a population of 7,804. But this plan is predicated entirely upon 1990 census figures, without adjustment for interim changes. And, regardless of the choice of population figures, that plan is unacceptable because it includes a region that is divided into two non-contiguous parts. It includes a banana-shaped section which touches the remainder of that region at only a single point, which happens to be in the middle of a railroad track. Persons cannot travel from one end of that region to the other without leaving and re-entering the region.

Defendants' alternated plan also purports to achieve reasonable equality among the regions. It is based upon the 1990 census figures, with adjustments which, according to defendants and their expert, reasonably reflect the changes and shifts which have occurred since 1990.

3. *Methodologies.*

Everyone agrees that the decennial census produces the most reliable population figures. The Census Bureau adjusts these terms annually, for each municipality, but without attempting to assign figures for subdivisions of municipalities. Until quite recently, the Census Bureau's annual adjustments were accomplished on the basis of records of births, deaths, and removals. Recently, however, the Census Bureau has adopted further refinements, taking into account residential construction and demolition and other appropriate factors. All of the experts agree that the new method produces more accurate annual

estimates than the old method. And the Census Bureau has reworked its annual estimates for prior years, applying the new methodology.

Plaintiffs' expert established the July 1997 population figures by starting with the Census Bureau's 1996 figures (which, in turn, derived from the 1990 decennial census figure, applying the Census Bureau's new method of calculation) and adjusted those figures to reflect interim changes between 1996 and July 1, 1997, in accordance with the same methodology (including growth trends as reflected by the Census Bureau's interim annual figures, building permits issued, etc.) I am persuaded that plaintiffs' figures for the July 1, 1997 population of each of the municipalities of the school district are reasonably accurate and should be the basis for an appropriate reapportionment plan.

Defendants' plans are based upon population estimates made by the superintendent of schools and the school district solicitor, as checked and approved by defendants' expert. The methodology is, in my view, not likely to have been as accurate as the methodology of plaintiffs' expert. Defendants start with the 1990 census figures, and make their own adjustments to account for post-1990 developments: basically, housing construction, planned housing construction etc. There are some problems with this approach: I am not convinced that the township's engineer's projections of planned housing developments, even if accepted as accurate, can properly be translated into immediate assumptions about present populations. Moreover, defendants seem to rely in part upon a cable TV service's count of buildings which can be served by cable TV, plus the cable company's (unexplained) assumption that, in the case of apartments buildings, approximately 50 percent of the residents have cable TV.

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I do agree with defendants' contention — indeed, both sides agree — that the population figures for municipalities are more likely to be entirely accurate than figures for each ward or precinct, which can be achieved only by estimating the appropriate allocation of the population of the municipality. It is not surprising, therefore, that the principal disputes among the parties have to do with whether they have accurately determined the populations of wards and precincts.

It follows, I believe, that calculation of the respective populations of each of the three regions is more likely to be accurate to the extent that the regions follow municipal boundaries. In other words, the less often the population figures need to be allocated among wards and precincts, the greater the confidence in the end result.

That is one of the reasons supporting the conclusion that plaintiffs' population figures for the three proposed regions are superior to defendants': plaintiffs' primary plan does not require as many attempts to allocate known populations to wards and precincts.

Another problem with defendants' plans is that they assign the two fastest-growing areas of the school district (the 3rd and 4th wards of Upper Chichester) to the same region. This has two significant draw-backs. Since the risk of inaccuracy in population estimates is necessarily greater in areas where significant changes are ongoing, combining the two fastest-growing wards into a single region compounds the risk of error in calculating the population for that region. And, of perhaps lesser importance, but still a significant objection, combining the two fastest-growing wards into a single region virtually guarantees that the voters in that region will be under-represented

in the near future, no matter how accurate the present reapportionment may be. Putting these two wards in different regions will at least slow down the disparity-producing process for future years.

The governing legal principles are not in dispute. The "one person, one vote" principle required by the Constitution's equal protection clause means that representatives to an elected body must be elected from voting districts of substantially equal population. *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). And, as a general proposition, population variations in excess of ten percent are unacceptable. Where the deviation is ten percent or less, a reapportionment plan is generally acceptable, unless the product of racial gerrymandering or other "political" considerations. *See, e.g., Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996).

I find that the report and testimony of plaintiffs' expert, Dr. Cupingood, is persuasive, and establishes that both of plaintiffs' plans achieve constitutionally-acceptable reapportionment. And, not withdstanding the charges and counter-charges concerning which of the four plans under consideration is best, neither side has succeeded in proving that the plans submitted by their opponents involve disparities greater than ten percent. My preference for plaintiffs' primary plan is, as discussed above, based upon my conclusions (1) that it is most likely to produce actual equality among the three regions, population-wise, and (2) unlike the plan principally espoused by the defendants, its three regions are all definitely contiguous.

A further factor bears mention: under plaintiffs' plan, the two geographical areas having substantial minority populations are contained within a single region. Under defendants' plans,

each of these areas is in a different region. While there is no showing that the defendants' plans were intentionally devised so as to reduce the likelihood that minority voters would have a substantial voice in school board elections, it seems desirable, all else being equal, not to create the impression that that is the case.

3. *Implementation*

Both sides agree that it is feasible to remedy the constitutional violation by electing a new school board which could take office by July 1, 1998. Plaintiffs would prefer that the special election be held as soon as possible — they suggest late March. The defendants have expressed a decided preference for having any special election which the Court might order take place in conjunction with the May 1988 primary election. They note that this will make possible the orderly selection of candidates, in accordance with at least the spirit of state election laws, and that a special election held on a different date would involve substantial expense. On this issue, I agree with the defendants. Plaintiffs' argument that voting machines would not be able to handle both a primary ballot and a special election ballot is refuted by the officials in charge of elections. I accept their uniform representation that it would be convenient and feasible to hold a special school board election in conjunction with the May primary election.

Since it is clear that the elections of the incumbent school directors were constitutionally flawed, and since all parties agree that it is feasible to conduct a constitutionally-valid election of a new school board to take office on or about July 1, 1998, it is necessary for this Court to enter an order requiring that that be done. The remaining question is whether the choice among the

competing reapportionment plans should be finally made by this court, or whether that choice should be committed to the state authorities. On the one hand, it is clearly preferable to leave the final choice to the state authorities, in the interest of comity of federalism. On the other hand, it can be argued that ample opportunity has already been provided for the state mechanisms to produce a constitutionally valid voting plan, and that the school district has shown an unfortunate propensity for foot-dragging and obstructionism. The record before this Court is voluminous, and complete. It establishes that either of the two plans submitted by plaintiffs would meet constitutional standards; the choice between them seems to be simply whether it is preferable to have regions which cross municipal boundaries, or a system in which voters in a particular municipality could only vote for candidates from that municipality. It would seem that this is a matter of policy which should preferably be resolved by the state courts, and which presumably could readily be resolved by the state courts in time for a special election at the May primary.

Which would be more intrusive upon local interests: requiring the state courts to choose the final plan on or before a date certain in the very near future, or specifying the final plan itself in this court? In my view, considerations of comity and federalism require that that choice, too, be left to the state authorities to the extent practicable.

In view of these considerations, I have concluded that the appropriate course to follow is to require that a new election be held at the May primary, and a new school board be in office by July 1, 1998; and, that the election be held in conformity with the primary plan submitted by plaintiffs, unless, upon proper application, the Court of Common Pleas of Delaware

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County chooses plaintiffs' alternate plan, or some other reapportionment plan substantially similar to these plans, and which also complies with constitutional requirements. Under this ruling, the state courts may, but need not, re-enter the fray.

An Order follows:

*Appendix B*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-7683

GEORGE JAMES, et al.

v.

CHICHESTER SCHOOL BOARD, et al.

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CIVIL ACTION

NO. 97-1663

SANTA FRATTARELLI, et al.

v.

JOSEPH P. KELLY, et al.

ORDER

AND NOW, this 30th day of January, 1998, IT IS ORDERED:

I. It is ADJUDGED AND DECLARED that either of the two following-described reapportionment plans submitted by plaintiffs complies with the requirements of Pennsylvania law and the United States Constitution:

## *Appendix B*

A. *Plaintiffs' primary plan* under which three members of the Chichester school board would be elected from each of the following three regions:

1. Region I, consisting of Upper Chichester Township, Wards 2 and 3, and the second precinct of Ward 1.

2. Region II, consisting of Wards 4 and 5 of Upper Chichester, and the first precinct of Ward 1 of Upper Chichester.

3. Region III, consisting of Lower Chichester Township and the Boroughs of Marcus Hook and Trainer.

B. *Plaintiffs' alternative plan,* under which three school board members would be elected from each of the following three regions:

1. Region I, consisting of Upper Chichester Ward 3, Upper Chichester Ward 2, Second Precinct, Lower Chichester, Second Precinct and the Lenox Park section of the Borough of Trainer.

2. Region II, consisting of Upper Chichester, Ward 2, First Precinct, Upper Chichester, Ward 1, Second Precinct, Lower Chichester, First Precinct, the Borough of Marcus Hook, and the remainder of the Borough of Trainer, upper and lower district.

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3. Region III, consisting of the balance of Upper Chichester (i.e., Wards 4 and 5 and the First Precinct of Ward 1).

II. The tenure in office of all present members of the school board of the Chichester School District will terminate on June 30, 1998. The vacancies thus created shall be filled at a special election to be held in conjunction with the May 1998 primary election.

III. At such special election, the new school board shall be elected on the basis of the Final Reapportionment Plan.

IV. The Final Reapportionment Plan for the Chichester School District shall be the *primary plan* submitted by plaintiffs, described above, unless:

A. Within ten (10) days of the date of this order, the defendants or persons acting on their behalf petition the Court of Common Pleas of Delaware County for approval of plaintiffs' "alternate plan" described above, or another plan which differs from the plans previously submitted to the state courts, and which complies with statutory and constitutional requirements, and

B. The Court of Common Pleas of Delaware County approves either plaintiffs' primary plan or plaintiffs' alternate plan or some other plan that meets all constitutional and statutory requirements, and causes its plan to be implemented by a valid special election to be held in conjunction with the May 1998 primary election.

V. The defendants are directed to take all necessary steps to ensure the prompt implementation of the Final Reapportionment Plan (i.e., plaintiffs' primary plan, unless superseded by a valid plan approved by the Court of Common Pleas of Delaware County).

VI. This Court reserves jurisdiction over all matters of implementation of the foregoing.

s/ John P. Fullam
John P. Fullam, Sr. J.

## APPENDIX C —MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED SEPTEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-7683

GEORGE W. JAMES, et al.

v.

PATRICIA KOCH, et al.

MEMORANDUM AND ORDER

Fullam, Sr. J. September 10, 1997

At the present time, the nine members of the school board of the Chichester School District are elected from nine different regions, one director from each region. It has been apparent since the 1990 census, and probably long before that, that this results in unequal representation, since some of the regions have populations greatly in excess of the populations of other regions. In state court litigation in 1996, it was determined that the present system of electing school directors violates the Pennsylvania School Code, because of the inequality of population among the various districts. In early 1997, the parties to the state court litigation agreed upon a settlement, which was approved by the state court, to remedy the violation. Under the terms of the

approved settlement, the nine regions would be replaced by three regions of approximately equal populations, and three school directors would be elected from each of the three regions. Under the terms of the settlement, however, the new arrangement would not be implemented until 1999, all incumbent school directors would be permitted to serve out their full terms, and only their replacements would be elected under the new arrangement.

Plaintiffs have brought this action on the theory that the present arrangement for electing school directors not only violates the Pennsylvania School Code, but also violates the constitutional rights of the plaintiffs and other residents in the over-populated districts. Plaintiffs have sought a preliminary injunction, and seek immediate relief in various alternative forms. Their first choice would be an injunction requiring all incumbent school directors to resign their positions immediately, and to have all nine members of the school board elected, at-large, at the November 1997 election. The deadline for achieving that result is only a few days away, September 15, 1997.

In addition to the immediate at-large election proposed, plaintiffs have also sought an order nullifying many of the official actions taken by the incumbent school board, on the theory that they all hold office illegally.

At one point, it appeared that plaintiffs would reluctantly accept a three-region arrangement, as provided in the state court settlement, but they are understandably unwilling to wait until 1999 to begin the process of achieving voting equality among the various regions.

The evidence produced to date clearly establishes that the present arrangement is a violation of state law and infringes rights

guaranteed by the federal constitution. The proposed three-region plan would probably past muster, at least on the basis of the 1990 census figures. However, those figures are now almost eight years old, significant population shifts have occurred in the interim, and additional development will undoubtedly occur in the populous districts between now and 1999. In short, it is at least arguable that the arrangement approved by the state court will no longer be valid by the time it is proposed to be implemented.

The real problem is to devise an acceptable solution to this dilemma. I have concluded that the situation simply cannot be remedied at the November 1997 election. More accurately, perhaps, I have concluded that the harm which will result from some additional delay in alleviating the constitutional violations being suffered by plaintiffs and those whom they represent is, while unfortunate, substantially outweighed by the confusion, disruption, and unfairness which would result from attempting to rectify the situation immediately.

While politically active persons interested in seeking election to the school board, or interested in supporting particular persons for election to the school board, might find it possible to achieve a place on the ballot before the November 1997 election, this would be most unfair to the countless others who might wish to seek election if they had had a reasonable opportunity to reach an informed decision. Moreover, achieving some degree of balance among the various geographical areas within the school district is a legitimate goal (so long as each vote is of approximately equal weight). In the present circumstances, however, where the impetus for both the state court litigation and this lawsuit arises in the more populous end of the district, declaring an at-large election might well unfairly advantage the

residents of those populous regions. In short, the three-region plan adopted by the state court seems decidedly preferable to an at-large system; and a three-region election would be even more difficult to arrange between now and September 15/November 1997.

On the other hand, I see no reason why the citizens of the Chichester School District should be forced to wait until 1999 before beginning a corrective process. Nor do I see any reason why incumbent directors whose elections are violative of the United States Constitution should necessarily be permitted to serve out their full terms.

The parties will therefore be directed to confer with each other (and, if they deem it appropriate, with the state court and the parties to that litigation) to achieve a plan under which all nine members of the school board would be elected, from three regions of approximately equal population, at either a primary, or special election to be held in early 1998.

Counsel will be directed to report back to this Court, not laterthan December 1, 1997, the results of their efforts.

In all other respects, Plaintiffs' Motion for Preliminary Injurction will be denied, without prejudice to further applications for interim relief if necessary.

An Order follows.

*Appendix C*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-7683

GEORGE W. JAMES, et al.

v.

PATRICIA KOCH, et al.

ORDER

AND NOW, this 10th day of September, 1997, IT IS ORDERED:

(1) Counsel are directed to confer with each other, with such state court officials and parties to the state-court litigation as they deem appropriate, and shall achieve a plan under which all nine members of the Chichester School District would be elected, three from each of three regions of approximately equal population, at the primary election or a special election to be held in early 1998. If the parties are unable to agree upon a single plan, they may submit alternate plans for this Court's review. Counsel shall report to this Court the results of their efforts (and shall submit the required plan or plans) not later than December 1, 1997.

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(2) In all other respects, Plaintiffs' Motion for Preliminary Injunction is DENIED, WITHOUT PREJUDICE to further applications for interim relief if necessary.

s/ John P. Fullam
John P. Fullam, Sr. J.